IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-111

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

SCOTIA COAL COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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AUTHORITIES CITED

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On Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The decision of the Sixth Circuit was in the form of a brief order and is not reported in the Federal Reports. The trial court rendered a rather full opinion on post trial motions after a jury verdict, and that opinion is likewise not reported.

Jurisdictional Grounds

This is a Sherman Act case based on 15 USC Sections 1, 2, and 15, and this Court has jurisdiction under 28 USC Section 1254 (1).

COUNTERSTATEMENT OF THE CASE

A. THE NATURE OF THE ACTION.

Respondent, Scotia Coal Company (Scotia), a producer and seller of bituminous coal in Eastern Kentucky, brought this case in the United States District Court for the Eastern District of Kentucky, Lexington, against petitioner, United Mine Workers of America (UMW), an international labor union. The suit is based on the Sherman and Clayton Acts (15 U.S.C. §§1, 2 and 15).

Briefly, Scotia charged that petitioner and the Bituminous Coal Operators Association (BCOA), which was organized by Consolidation Coal Company (Consol), the largest producer and seller of bituminous coal in the country in 1950, and others engaged in an unlawful conspiracy in the period of this case (1964-1967) to eliminate and suppress competition and production of all but the largest companies in the coal industry. The plan of the conspiracy was that only the coal operators who signed and complied with the National Bituminous Coal Wage Agreement of 1950 as amended (NBCWA), including the 1950 Supplement containing the Protective Wage Clause (PWC), and the later supplements which contained the 80¢ Welfare Clause, would be permitted to carry on operations. It was alleged that the smaller companies or companies not operating in ideal working conditions could not operate profitably under the provisions of the National Agreement; that those who did not sign were not permitted to operate, and were forced out of business; and that plaintiff was damaged as a result of the conspiracy.

The proof in this case, more than in any of the previous several cases considered by this Court, abundantly supported the jury verdict for plaintiff. The record shows

the main producer associations in the country pooling their efforts and literally forcing the field agents of the dominant union to "stop issuing illegal (below national contract terms) contracts", and causing the spending of hundred of thousands of UMW dollars in doing something (on the prodding by the associations) about the problem of non-union and non-contract coal getting into the markets which was holding the coal price down. Finally the associations (not the UMW as was stated by witnesses in previous cases) got the Protective Wage Clause into the national contract (John Lewis was actually unfavorable because he didn't see how it could work) to get a protection of contract operators and to get "closer cooperation by contract operators" and because the market was so affected by the non-contract low priced coal which was becoming a problem because there "were men who were members of the United Mine Workers effectively opposing interference with their non-contract operations in order to hold their jobs".

The association representatives worked diligently on the Joint Industry Contract Committee alongside UMW International Officers policing the whole industry. The minutes show these representatives carefully kept UMW to its commitment to national contract terms, and then Landrum-Griffen came along and interferred with the PWC boycott. But because of the effect of non-union or non-contract coal on market price there had to be a resumption of restraints, and BCOA was repeatedly saying this to UMW in March 1964. The 1964 contract then became effective April 2, 1964 with the "Eighty Cent Welfare Clause" which was another very effective form of boycott of non-union or non-contract coal.

Because of the conspiracy, Scotia suffered a long and costly strike.

B. THIS COURT HAS PREVIOUSLY CONSIDERED SEVERAL CASES DEALING WITH THE CONSPIRACY CHARGED IN THIS CASE.

On two occasions this Court has heard full arguments and handed down both majority and minority opinions dealing with the charged conspiracy and in several cases it has considered and not granted petitions for certiorari involving the same conspiracy. These cases include *Pennington v. UMW*, 381 U.S. 657 (1965); *Ramsey v. UMW*, 401 U.S. 302 (1971); *UMW v. Tennessee Consolidated Coal Company*, 416 F.2d 1192 (cert. denied 397 U.S. 964); and *South-East Coal Company v. UMW*, 434 F.2d 767 (cert. denied 402 U.S. 983).

C. FIVE JURIES HAVE NOW FOUND THE CONSPIRACY DID EXIST.

In the five cases in which juries were asked to determine whether the alleged predatory conspiracy actually existed in the coal industry, all five have resulted in verdicts in the affirmative. Besides the verdict in this case, there were affirmative verdicts in the "*First Pennington Case*", *Pennington v. United Mine Workers*, 325 F.2d 804, reversed and remanded 381 U.S. 657; *Tennessee Consolidated Coal Company v. United Mine Workers*, 416 F.2d 1192; cert. den., 397 U.S. 964; *Blue Diamond Coal Company v. United Mine Workers*, Civil Docket No. 6189, United States District Court for the Eastern District of Tennessee, Northern Division (no appeal); and in *South-East Coal Company v. Consolidation Coal Company* and *United Mine Workers*, 434 F.2d 767 (cert. den. 402 U.S. 983).

D. THE INSTRUCTIONS TO THE JURY IN THIS CASE WERE AGREED UPON AND STIPULATED BY THE PARTIES.

Because of the extensive previous history of litigation dealing with the issues raised in this case, the parties were able to agree on the basic legal rules governing the case and the trial court presented a stipulated charge to the jury (440a-443a). This is pointed out in the opinion of the trial court and in the order of the Court of Appeals.

E. THE BRIEF ORDER OF THE COURT OF APPEALS POINTS OUT THAT THE LAW OF THE CASE WAS IN THE STIPULATED JURY CHARGE AND THAT THE EVIDENCE SUPPORTS THE JURY FINDINGS.

The essence of the conclusion of the Sixth Circuit on this appeal is contained in the part of its order which reads:

"The fact that the Court's instructions to the jury were stipulated by counsel for the parties and agreed upon prior to the giving of said instructions precludes our review thereof. After a review of the record, it is concluded that there was sufficient evidence to permit the case to be submitted to the jury, and to sustain its verdict".

COUNTERSTATEMENT OF FACTS

1. *The Combination, Agreement and Conspiracy which Violated the Sherman Act.*

(a) *Beginning of the Illicit Agreement and Understanding between UMW and Major Producers in 1950 and Formation of BCOA.*

UMW's policies drastically shifted and changed in 1950. Before 1950 UMW's prime basic policy was the promotion of equality in work opportunity among all of its members with the accompanying and necessary corollary of competitive equality among the coal producers of the industry. These basic purposes and policies were succinctly and clearly stated in some of the minutes of UMW and were being enunciated very strongly in 1948 and 1949 when the struggle was on for new contracts which struggle was finally consummated in 1950 (Exhs. 1, 4 through 12; 66a-97a).

Much of UMW's early history in collective bargaining involved the establishment and adjustment of differentials in wage scales so as to promote equality of working opportunity for members and competitive equality among producers, taking into consideration the nature of coal seams in the various sections and market and transportation inequalities (Exhs. 1, 4, 5; 46a, 66a-78a).

In 1948 and 1949 the growing threat that the industry would become concentrated into a small number of major producers caused violent reaction from UMW (Exh. 6; 78a-82a) and its strikes and three day work weeks in that period were to bring about equal work opportunity and to spread the work among all the members and these purposes are very vividly and clearly shown in the letters of Mr. John L. Lewis to the membership and in the United Mine Workers Journal's articles (Exhs. 7, 8, 9; 82a-86a). As stated, in the period of the 1940's the industry was undergoing some change with respect to methods of production, and mechanical operations were beginning to take over a substantial part of the industry (Exh. 3; 74a-75a). Some major markets for coal were being taken over by gas and oil in the late 1940's (48a-49a).

A basic fact in the coal industry is that coal seams vary greatly in size and adaptability to high productivity, particularly as to being able to use the large and more productive mine machinery with which mining of coal becomes less a matter of labor costs and more a matter of large scale capital expenditures on machiney in thick seams of coal with sufficient reserves to justify such expenditures (155a-156a). This type of mining promoted greater concentration in the industry in the late 1930's and 1940's (156a). The threat of mass unemployment among its members caused great concern on the part of UMW. Lewis was urging the bituminous industry to adopt the production control or spread the work plan which he had instigated and actually set up in the anthracite industry (Exh. 10; 76a-87a). Lewis was urging the bituminous industry to establish a leadership to stabilize the economic side of the industry, saying if the industry did not do it the UMW would (Exhs. 6, 9; 79a-82a, 85a).

The struggles which took place in the industry in that period of time almost brought the country to a stop in its economic life. The President of the United States intervened and new legislation was about to be presented to Congress with respect to the coal mining industry when the National Contract of 1950 was signed (Exh. 12; 94a-97a).

Shortly after the signing of the 1950 Contract Bituminous Coal Operators Association (BCOA) was organized, composed of producers of about 50% of coal production (49a, 96a). This was by the efforts of the largest coal company, Consolidation Coal Company. The officers of Consolidation Coal Company had previously led the industry spokesmen in the bargaining with the Union in industry contracts (Exh. 49a, 90a, 91a). The company's head, Mr. George

Love, testified he had a desire to do what he could to see that no competition paid lower laborcosts than Consolidation paid regardless of the competitor's circumstance or mode of production (92a-93a). The representatives of Consolidation Coal Company in the initial meetings of BCOA, because of the tonnage which they represented, had a very large share of the voting power in BCOA (Exh. 13; 98a-101a). The president of Consolidation had previously discussed with Mr. Harry Moses the job of taking over as head of the proposed new organization and shortly after the formation of BCOA Mr. Harry Moses was designated president of BCOA and took over the job of bargaining with UMW in the industry (Exh. 13; 98a-101a, 91a-92a).

From that time the bargaining in the industry has been carried on in secret by a so called two-man bargaining team, Mr. Lewis and Mr. Moses composing the two-man team, and later Mr. Lewis and Mr. Fox. The previous struggles between the industry and the Union no longer occurred and the agreements were arrived at without any necessity to terminate the previous contract or to make any public utterances concerning what was transpiring in the secret conferences (Exh. 15; 105a-108a).

After 1950 the attitude and policy of UMW with respect to equal work opportunity for all of its members and with respect to competitive equality among all coal producers, drastically changed and the stated purposes and policy of UMW was to promote the intensive mechanization of the industry and the concentration of production into fewer units with the express recognization that "more and more of the obsolete units will fall by the board and go out of production" and that the industry was dedicated to continue the development of the "great combines now being formed in the industry" (Exhs. 19, 20, 30, 31; 115a-116a, 188a-191a).

On the side of the industry, leading spokesmen of the operators who were the representatives of Consolidation Coal Company, had pointed out before 1950 that they had obligations as such fiduciary representatives of the industry to recognize the interests of all of the smaller companies they represented and not just the interests of the major producers, and this concept of fiduciary responsibility was emphasized in the period of 1948 and 1949 (Exh. 11; 89a-90a). However, since the formation of BCOA and the collective bargaining in two-man teams between Harry Moses and John L. Lewis started in 1950, the representatives of BCOA have pushed such concepts aside and Mr. Moses has described his relationship to the industry and to the Union as being part of a "quest for stability" wherein BCOA and UMW decided to get out of the "Kleig-Lights" and make the BCOA organization the mechanism for the settling of "national problems on an authoritative basis" (Exh. 16; 109a-111a).

After the amendments to the 1950 National Bituminous Coal Wage Agreement were negotiated and signed by UMW and BCOA following these secret sessions in the years 1951, 1952, 1955 and 1956 (Exh. 14; 101a-105a), they were put into printed form and sent to the district offices of UMW to obtain signatures of other coal producers not represented by BCOA (50a). Each of these amendments very substantially increased the wage per hour per man across the board in the very same amounts for every coal mining job in the industry. The district officers and field representatives had the responsibility of obtaining signatures of such other coal producers to the printed forms

of the amendments. These local or district representatives had no authority to make any change whatsoever in the printed forms of the contracts. The only body with authority to make any change in the contract was the International Union's Policy Committee which has not approved any change for any producer in any of the national contracts since 1950 (Exh. 17; 112a-113a).

Also in October 1950 the International Union formed the International Organizing Committee to promote an intensified drive through all the non-union areas of the Country (51a). This drive was reported to have great success in the following years in spite of numerous efforts to obtain court relief in the form of injunctions (Exh. 18; 114a-115a).

Because of the flat wage increases across the board for every job, it was a natural and necessary thing that intensive mechanization resulted. With more and more flat increases in costs being added for every man in the labor force, the producers rapidly shifted to the use of machines. Gigantic new machinery was put into the underground mines putting new stresses upon the men, and the stripping of the surfaces of coal lands by monstrous new strip shovels and draglines greatly expanded in the 1950's and 1960's (Exhs. 3, 21, 23, 29, 31; 51a, 74a-75a, 116a, 117a, 190a-191a).

It became the policy of UMW to have the production of coal taken over by big combines and bring about concentration in the industry and this was largely achieved (56a, 188a-189a, 190a-191a).

UMW pursued these policies in spite of the violent reaction of many of its local union delegations at the International conventions, who spoke of the rapid reduction of the

manpower in the industry with resulting enormous and starkly tragic unemployment in the coal producing areas while at the same time the men who were left in the industry in underground production faced new and difficult, dangerous and health impairing conditions by reason of the gigantic new machines that they were having to keep up with (Exh. 23; 167a, Tr. 160-166).

Also in the 1950's UMW commenced to invest many millions of dollars in certain major coal producing companies, and thus in bargaining for national contracts UMW was not only representing UMW members in all the units of production in the industry but it was also standing there as the owner of a major coal company and thus had the resulting inclination of benefiting itself as such owner by designing the contracts to fit the abilitites and the interests of major coal companies in the national bargaining (Exh. 22; 118a-122a).

(b) *The Existence of Express and Implied Illicit Agreement is Clear since the Protective Wage Clause of the 1958 Contract, which was followed by the 80¢ Clause in Later Contracts.*

As will be shown below, in the period after the 1956 national contract amendment, UMW and the coal associations turned to the use of restrictive language in the contracts to bar non-union or non-contract coal from markets. In this period the regional associations, Illinois Coal Operators Association and Southern Coal Producers Association, took a prominent part with BCOA.

Plaintiff relies not just upon the express restraints put into the contracts but also upon the *implied understandings* that logically and obviously arose.

(1) *The Original Reluctance of some of the Regional Associations of Producers such as SCPA to Engage in the BCOA Framework of Bargaining with UMW.*

The Southern Coal Producers Association (SCPA) (of which Blue Diamond was a member until 1957 as discussed above) was composed of a number of coal producers including the largest coal producers in the south, and the association was formed primarily for the purpose of coordinating and unifying the coal producers of the south into one compact organization which would have the strength to deal with UMW in the making of wage agreements and to compete with the northern producers who were more favorably situated as to freight rates, markets and with better natural conditions (47a-48a, 130a-132a, 136a-137a). The association fought vigorously from its founding in 1941 until the 1950's in seeking to avoid having to sign the same contract terms that the northern producers signed with the UMW. The southern producers contended that their conditions were not as favorably disposed as the northern producer's conditions so that they were unable to match contract terms with the northern producers. It was the expressed concern of members of SCPA in that period of time that the reason that the contract terms were pressed upon the southern companies was to eliminate competition of the southern companies because of the more favorable situation of the northern producers (148a-151a). This prevailed at least until the middle of the 1950's and in that period the southern companies were in opposition to BCOA in this regard. However the same contract terms were imposed upon the southern producers and each time BCOA negotiated a contract amendment with UMW the same terms were finally signed by SCPA who had nothing to say

about those terms in the 1951, 1952, 1955 and 1956 amendments (134a-135a, 138a-139a, 140a-143a).

(2) *The Switch in the Policies of the Regional Association; How the Protective Wage Clause (PWC) of the 1958 Amendment Originated.*

In the 1950's BCOA was concerned about the growth of non-union coal competing in the markets and was urging UMW to do a more vigorous organizing job (147a-148a). The Minutes of SCPA also disclose the growth of competition of non-union operations and in 1955 and later years these minutes show the concern of the members of SCPA (who were signatories to the national contract) with the UMW over the development of this non-union competition. The members of SCPA discussed the possibility of acting against these non-union or non-contract operations, and Mr. Moody, the President of SCPA explained to the membership that he frequently mentioned this problem to Mr. Lewis of UMW who claimed that he was spending hundreds of thousands of dollars on the problem of suppressing the non-union operations who were competing with the signatory operators. SCPA members also claimed that UMW was issuing "illegal contracts to operators" (i.e. contracts at terms below national contract terms) though this was denied by UMW, and the SCPA members demanded that conferences be had with the Union to make some effective headway against these practices. As always the Union responded "give us names and places" with respect to these operations not under the national contract. The president of SCPA testified that Mr. Lewis tried to do something about it but it was difficult to get specific information concerning it and what should be done about it. "It went from outright violence down to conversation but no one ever came up with a real plan that was effective", he said (157a-160a).

In August 1958 this problem was the principal item on the minutes of SCPA and the members were demanding some sort of action. The minutes show: "Mr. Lewis had expressed his concern and was open to constructive suggestions to better the situation. Mr. Moody said: 'I had a meeting with Mr. Lewis last week which lasted several hours and this was one of a series I have had commencing with your request two months ago that I discuss our problems with him." (160a-161a).

Mr. Moody, formerly president of SCPA *and later president of BCOA*, testified as to how the Protective Wage Clause (PWC) came into being. This was a part of the 1958 amendment to the national contract. He said:

"I discussed it with Mr. Lewis. He was not very favorable at the time, mainly because he did not see just how it could be done. Well, I talked to him a couple of times more and said that I thought that it would give a central place of consideration of administration and would be helpful. And I mentioned to him this problem, that my people were becoming very adamant on their demand that something be done about the noncontract coal. And I don't know the time factors in here, but at another meeting it was talked about and there was one day I was over talking with Mr. Lewis and he showed me two papers which purported to be what we later called a protective wage clause—in other words a protection of the contract operators. One of them was in left field and one of them was in right field. I did take them and brought them up here —not to this place but to our counsel—. . . . (the Welly Hopkins of UMW and the Ed Fox of BCOA drafts) . . . .

"Well, the basic approach of each was the same. It was to work out some method of closer cooperation by contract operators. However their approach to the thing was wide open and I have forgotten the difference on the thing. That is why I was hesitant about discussing the matter. But I brought it to counsel and asked them, one, for advice of counsel on the legality of such a thing and, two, would they redraft it to see if they could bring up something that was bright-eyed and shiny because Mr. Lewis said 'if you have any bright ideas let's see how smart you are'. My memory is that is what happened. And we brought them back and the Protective Wage Clause that was put into the contract was pretty much what was written in this law office including the licensing and soforth that went with it." (163a-164a)

Mr. Moody also explained in the minutes of SCPA the theory behind the PWC as follows:

"In the promulgation of this contract over the years and especially in the past ten years, we have established a wage situation whereby most operators and industry as a whole, had to go to general mechanization of their operations because of the very high cost of labor. In so doing, in the case of the coal industry, there was a major decrease in the number of employees and according to the Bureau of Labor Statistics, there was a drop from 400,000 to less than 200,000.

"There has been a major increase in the number of pensioners. Many miners left the coal fields, but many have returned and many never left and so we find a surplus of labor throughout the coal fields.

The law of supply and demand took over and we discovered that the labor price established by the contract, was not the price established by the number of miners available for work. The situation encouraged the establishment of mines, not under the union contract. This also presented the Union with a problem, as they found men who were members of the United Mine Workers, effectively opposing interference with their noncontract operations in order to hold their jobs. Therefore, the Union found it was unable to carry out major organizing campaigns. Lastly the coal market was rather seriously weakened as far as price was concerned as there was a premium on noncontract, low priced coal." (165a-166a)

Some time before the PWC was signed Joseph Moody as head of SCPA was conferring with Mr. Hamilton Beebe of the Illinois Coal Operators Association about the terms of the PWC (165a).

At the same time Mr. Fox of BCOA and Mr. Kennedy of UMW were exchanging drafts of a proposed protective wage clause. Mr. Hopkins testified, and UMW answered interrogatories, to the effect that the operators demanded Paragraph "A" of the PWC (128a, 339a-340a).

The men who became members of the Joint Industry Contract Committee under the PWC in 1959 were these same men, that is Mr. Fox, Mr. Moody and Mr. Beebe, for the coal operators and the International officers of the Union for the United Mine Workers (Exh. 27; 127a).

(3) ***The Language of the PWC and the History of its Enforcement. Contest of PWC under the Labor Law. Substitution of the "Eighty Cent Welfare Clause".***

The PWC was an amendment to the National Bituminous Coal Wage Agreement of 1950 made in December, 1958 (Exh. 24). In the introductory paragraph of PWC all of UMW's local branches and agents (and this would include the field representatives) were included in the definition of "United Mine Workers of America," and this paragraph expressly binds the Union as thus defined to exercise all possible efforts and means to attain the objective of having the national contract terms observed in all bituminous coal mines (Exh. 24; 123a-124a).

Paragraph A, which was demanded by the associations, reads:

"During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto." (124a)

Paragraph B of the PWC required signatory operators and affiliated corporations to boycott coal produced without compliance with the national contract. It also provided that the clause "covers the operation of all the coal lands, coal producing or coal preparation facilities ownedor held under lease by them, or any of them, or by any subsidiary or affiliate" (124a-125a, Exh. 24).

Paragraphs C and E of the PWC established a "Joint Industry Contract Committee" (JICC) to act as a tribunal to try UMW or any operator for violations of the duties contained in the PWC (125a).

Paragraph D required UMW to report "complete" lists to the JICC of the names of "all" of the operators "whose operations are under contract with the Union." A signatory operator was not subject to trial for buying or dealing in coal produced by any operator on this list reported by the Union unless the operator had previously been found not in compliance with the contract.

Paragraph E required UMW to make available to the JICC "all contracts, agreements, or understandings entered into by the United Mine Workers with any person engaged in the production of bituminous coal" and to make its appearance before the JICC on request in case of investigation of alleged violations of the PWC (125a-126a).

In the first meeting of JICC on January 21, 1959, (page 29a) of the minutes (Exh. 27), it is said:

"The Committee next considered and authorized the release of a public announcement of the Committee's establishment and organization under the terms of the 'Protective Wage Clause'."

The next issue of United Mine Workers Journal, February 1, 1959, at page 9 carried such a public announcement including this statement:

"The UMWA also agreed, in the clause, that it would not make any agreement on wages, hours or conditions of work on any basis other than is specified in the contract" (Exh. 25; 126a-127a).

The minutes of the JICC, whose members, as stated, were the men who formulated the language of the Clause, show that the district presidents of UMW were required to send in lists to the JICC certifying that each list was a "complete list of all operators and mines engaged in the production of bituminous coal within this district . . . ., and whose operations are under contract to the said Union". These lists were added to from time to time, as new contracts were made (Exh. 27; 178a).

The JICC sent out demands to all of these companies (that is all companies who had a labor contract of any kind with UMW) that they send back certification of compliance in the prescribed form, —that is, that they were paying the national contract scale and welfare royalty and had "complied fully with the other provisions of the said national agreement" (Exh. 27; 178a).

Hundreds of companies did not send back the certifications, and, after a second letter of warning, formal determinations were made and recorded of violation of the Protective Wage Clause on the part of 1,328 coal operators across the country, the determination being that every such producer "has violated the Protective Wage Clause" of the 1950 contract as amended, and:

". . . . has failed and refused to comply with its obligation under such clause to certify in writing

to the Committee that it is in full compliance with all of the terms and conditions of such agreement." (Exh. 27; 179a-182a)

The Landrum-Griffen Act with its "hot-cargo" or secondary-boycott provisions was passed by Congress in September, 1959. The JICC had been at work several months and was getting its enforcement program into high gear. But the new act cast doubt upon the legality of the boycott contained in Paragraph B. Because of this, JICC passed a resolution on November 4, 1959, suspending enforcement of the boycott pending clarification of the legal situation (Exh. 27; 182a-183a).

One of the two main aspects of the resolution of the Joint Committee suspending its formal activities in enforcing the boycott under Paragraph B of PWC, was an attempt to afford operators with a defense to treble damage antitrust cases based on the boycott called for by Paragraph B. Thus Mr. Lane, attorney for both Southern Coal and the JICC reported to the Southern Coal membership on November 9, 1959, about the suspension resolution as follows:

"2. In the event signatory operators are confronted with the possibility of lawsuits—including antitrust treble damage suits—or other disputes or issues pertaining to the subject matter of the Protective Wage Clause, they are now possessed of an official document with important defensive aspects and which in numerous cases may well be importantly instrumental in protecting the position of signatory operators." (172a-173a)

There was no intention of suspending the parts of PWC about which plaintiff complains in this case—Paragraph

A and other parts which put restraints on the Union's bargaining policy. Thus, Mr. Moody, one of the members of the Joint Committee, reported back to the Southern Coal meeting of November 9, 1959 about the suspension resolution:

"(Mr. Moody read the Resolution) Mr. Moody called attention to the fact that one of the discussions that took place was that the Protective Wage Clause, hereby made inactive, has two sections, Section A and B. Mr. Moody said that Section A (the Union obligation) was discussed; that Section A does not appear to be affected by the new law as far as could be determined at this time; and that if any ruling under Section A is desired, action can be brought before the committee and the committee will consider it. In other words it is still possible to process a Section A matter and the members of the committee will be available for that consideration." (Parenthetical matter as well as the rest of the quote is part of the minutes of Southern Coal). (172a)

A subsequent special meeting of the Joint Industry Contract Committee late in the 1960 (Minutes of meeting of July 27, 1960, page 2) continued this policy, the minutes of the Joint Committee stating:

"The Chairman (Mr. John L. Lewis) stated that the principal purpose in calling the special meeting of the Committee was to further consider the resolution passed by the Committee on November 4, 1959. There was a general discussion by all members of the Committee as to the rights, duties, obligations of the Committee under the Protective Wage Clause with due regard to the congressional action taken in September, 1959. It was pointed out by counsel

present that certain provisions of the Protective Wage Clause were not affected by the Labor-Management Reporting and Disclosure Act of 1959 and that it was not only the right but the duty of the Committee to continue to function as an instrumentality for the advancement of the interest of the contracting parties to the National Bituminous Coal Wage Agreement." (Exh. 27)

The JICC met occasionally until 1964 (Exh. 27).

Ultimately JICC authorized attorneys to represent the members in any proceeding challenging PWC and a NLRB case was filed (Exh. 27). It was founded on Landrum-Griffen and had nothing to do with antitrust law (185a).

It is evident the interruption in the work of the committee by Landrum-Griffen was having its effect on the UMW's organizing effort. On March 12, 1964, Fox of BCOA wrote the president of Island Creek Coal Company, largest southern company in Southern Coal:

"Dear Jim: Thank you very kindly for your letter of March 10, 1964. The matter of the competition of those in the bituminous industry who are non-signators to the National Bituminous Coal Wage Agreement and thereby not obligated to pay a higher wage scale and the 40-cent royalty has been discussed on many occasions with the United Mine Workers.

"I hope that my presentations and the presentations of others in the industry to the officials of the United Mine Workers of America will make them appreciate the seriousness of this situation, not only

to the coal companies, but to the United Mine Workers of America as well.

"It is most difficult to meet any demand made by the Mine Workers when there is a lack of opportunity to increase the price of coal to meet these demands" (Exh. 39; 436a-437a).

Another provision against non-union or non-complying coal was inserted by UMW-BCOA in the 1964 amendment to the national contract in the month following the above quoted letter of Mr. Fox. This was the "Eighty Cent Welfare Clause" (Exh. 28). This provision reads:

"During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall during the life of this agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition." (Exh. 28; 186a-187a)

Not only did the foregoing language force all companies which were affiliated with a signatory operator under the contract terms, but also the section of the 1964 contract

entitled "Application of Contract to Coal Lands" carried forward the provision from Paragraph B of the Protective Wage Clause that "this agreement covered the operation of all of the coal lands, coal producing and coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate" (Exh. 28, Pages 2 and 3).

The language in PWC and the Eighty Cent Welfare Clause contributed great difficulties in the marketing of coal by a company, such as plaintiff, which did not operate under the national contract (55a, 302a-303a).

By this time most of the smaller and middle-sized companies in the coal industry were in extremely difficult financial straits, just as Blue Diamond was, under the national contracts with these kind of restraints written into them. As Mr. George Love confirmed, in his testimony, the two largest companies, Consolidation Coal Company and Peabody Coal Company could well afford to pay the contract terms with the welfare burden and were still in good shape with combined net income of $43,000,000 (in 1959). After subtracting that income of Consolidation and Peabody, the statistics of the industry showed that the other companies making profits had combined income of $25,000,000, while the great mass of deficit companies had a combined loss of $37,400,000—or a net loss for the whole industry, after subtracting Consolidation and Peabody, of $12,500,000 after they had paid $105,200,000 into the welfare fund under the contract (366a-368a).

(4) *In the Period of this Case and Since the Landrum-Griffen Act UMW and BCOA Struggled to Sustain the Legality of the Express Boycott Restraints of the National Contract Challenged under the Act but They were Reluctant to Disclose whether the Express Restraint on UMW's Bargaining Freedom had been Dissolved; the Implied Restraint Clearly Remained.*

We have shown above the fact that the representatives of UMW and the major associations on the Joint Industry Contract Committee carefully avoided eliminating the understanding under Paragraph A of PWC when they suspended the enforcement of the Paragraph B boycott at the time of the passage of the Landrum-Griffen Act. The understanding expressly arrived at was that the restraints on UMW's bargaining freedom would be maintained.

UMW has contended the 80¢ clause entirely superseded the PWC in 1964 by reason of the introductory language of the contract of that year but the national contract of 1964 failed to make any express reference to the PWC of the 1958 contract (Exh. 28). Rather what was done by UMW and BCOA was not to refer expressly to their previous written commitments contained in the introductory paragraph and in Paragraph A of the PWC and make it clear they were releasing each other, but they carefully avoided that approach. The arrangement they made was to use the beginning language of the 1964 agreement to make it possible for them to claim later, if they should get in trouble, that they had taken PWC out of the contract indirectly and without express reference by relating the 1964 contract back to the 1952 contract which antedated the PWC and attaching the 1964 amendments on to that earlier contract.

But as shown above, another form of boycott was inserted in the 1964 contract in the Eighty Cent Welfare Clause right after BCOA had told UMW something more had to be done about the non-union or non-contract coal (Exh. 39).

If UMW was released from its restraints it was obviously not clear to the rest of the industry which had to live with the question of whether the basic understandings between UMW and the major associations as expressed in the 1958 PWC had been modified in the secret bargaining. Some of UMW's own local members who attended the negotiations between UMW and Scotia and who were UMW witnesses in this case testified they understood from UMW officials that UMW would make no contract except the national contract (387a, 395a). In spirit and in practice it was evident there was no modification in basic understandings about UMW's lack of freedom to bargain.

According to the answers to interrogatories, the UMW and BCOA representatives continued their strenuous efforts to have the legality of the PWC and 80¢ clauses under labor law sustained in the NLRB case in Washington. This effort was continuing in the period of this case in 1966 and 1967 (185a).

It would be illogical to assume, and hard to believe, that UMW and BCOA and the other associations had abandoned or terminated any of their implicit understandings with respect to restraints previously agreed upon when they were still striving to sustain the validity of the part of those restraints challenged under Landrum-Griffen in the period of this case. It would take strong proof to show that there was an abandonment of the restraints upon UMW's bargaining freedom and it would require proof that this information was clearly and broadly disseminated throughout the industry so that those involved and concerned (but not participants in the secret bargaining) would know what the situation truly was.

2. *The Impact of the Illicit Combination Agreement and Conspiracy upon Plaintiff.*

Scotia was organized in 1961 by Blue Diamond to operate the Scotia Mine at a time when Blue Diamond (which for many years had operated a number of UMW mines in Virginia, Kentucky and Tennessee) had only one other mine left—the Leatherwood Mine, which was losing money and which was the last mine in its area, the Hazard Field of East Kentucky, to live under the terms of the UMW national contract (53a, 55a). Blue Diamond had gotten out from under the UMW contract by the time of the 1964 contract (53a-54a). The miners in the Scotia Mine were represented by Southern Labor Union (226a). The Scotia Mine was Blue Diamond's only source of profit by 1964 (55a).

In 1965 UMW came in to conduct an organizing campaign at Scotia and succeeded in winning an NLRB representation election (56a, 226a). Upon UMW's demand for a contract at Scotia there commenced a series of six meetings from March 18 to July 27, 1966, between UMW representatives and Scotia officials discussing contract terms. At all these meetings the UMW delegation was headed by William Turnblazer, President of UMW's District 19 (226a-236a).

At these meetings Scotia made various written proposals for increases in wage terms. Scotia pointed out that the UMW demand for welfare payments per ton of coal at Scotia was equivalent to $300.00 per month per man which was beyond reason and practicability to spend for the kind of benefits received and Scotia presented written proposals from insurance companies for equivalent benefits at below 10¢ per ton or a fraction of the cost of the national contract. UMW never presented any counter proposals

that were not equal to or greater than national contract terms. The last meeting was with a representative of the Federal Mediation and Conciliation Service present and the meeting broke up without any change by UMW in its demands (226a-236a).

With these meetings ending up with the parties poles apart Gordon Bonnyman, then president of Blue Diamond and Scotia, had some sessions with George Titler, vice president of UMW and a session with Tony Boyle, president of UMW. These meetings were likewise unsuccessful, and are discussed below in the argument under questions 2 and 3. Under national contract terms the Scotia Mine might have made a profit if it were not for the forty cents per ton welfare requirement. The welfare terms would put Scotia into a loss position with a heavy investment there. Subsequent events proved that it would have been disastrous to have signed the national contract (56a-57a, 299a-300a).

In the meantime on June 1, 1966, after the meetings had been going on almost three months, a picket line was established by representatives of the union at the entrance to the mine. The miners did not cross the picket line and mining operations stopped (57a, 194a, 200a-201a, 236a-237a). At least some of the men would not cross the picket line because of fear (195a, 221a).

A UMW local union had been organized for the mine, and the men went there to hear the district officers deliver pep talks and relate that the company was being drawn nearer and nearer to signing the national contract (195a-196a).

Pickets were paid a weekly amount by District 19 which was receiving supporting funds from the international

union. The men were required to picket to receive these funds (194a, 197a).

District 19 held at least one area meeting with international participation to stir up support and enthusiasm for the strike (194a, Exh. 34).

After the sixth fruitless meeting between Scotia and UMW representatives, on June 10, 1966, Scotia sent out a letter to the miner employees stating that work was available at Scotia and stating the terms of employment, which were the same terms as offered by Scotia at the last meeting with UMW. The letter also stated that there seemed to be an impasse in the negotiations, but Scotia remained willing to meet with UMW if UMW had good faith modified proposals for consideration (Exh. 35; 197a, 235a, 237a).

Then on July 12, 1966, a group of 23 men, waiting until the picket line was at its weakest, formed a convoy, came through the picket line and went to work (198a, 203a, 208a, 221a, 237a). For many months after that there was massive picketing. Some of the working employees lived on the mine premises and some organized a system of automobile convoys to enter and leave the mine. There were the kind of altercations, threats of violence, name calling, display of firearms and tacks thrown in the driveway, that might be expected from the daily confrontations of these convoys with the massed pickets (198a-202a, 212a-213a, 217a-218a, 224a, 237a-239a).

It required some twelve months for Scotia to restore its production to the pre-strike level. It was difficult to obtain men to replace the men lost after the picket line was established. Training of new men required a

lot of time to obtain tolerable efficiency and safety (205a-210a, 221a-223a, 240a).

3. *Damages*.

The damages suffered by plaintiff Scotia are shown in Exhibit 37 (457a-462a). This is basically a comparison of profit of Scotia in the 12 month period before the strike and the 12 months period after the strike started, during which latter period Scotia was struggling to recover from the effects of the extended shutdown and loss of its crews and while Scotia was vainly trying to negotiate practical and workable terms, but (as Mr. Hoffman, Scotia's President, testified) was denied its "right to bargain so that you have knowledge that you are going to make money, some money, without accepting someone else's contract that we didn't have anything to do with" (65a).

There was some small difficulty in presenting a comparison of two 12 month periods which did not coincide with the fiscal year of the company. Scotia's fiscal year ran from April 1 to March 31. The strike started June 1, so the two periods being compared start June 1.

There was also some small difficulty in making adjustments so that the representation of the two periods would be on a consistent basis. Thus adjustments had to be made for allocation of overhead costs (which were habitually made on a tonnage basis between Blue Diamond's affiliated operations) when Scotia's tonnage greatly dropped because of the strike.

An adjustment was made to compensate for a change made during the second period in basis for depreciation on fixed assets at Scotia (habitually calculated on the basis of amount estimated reserves of coal), there having

been an increase on the company's books in the estimated reserve during the second period.

Also, adjustment was made for increased labor cost in the second period because of the increased rate of pay granted by the company, in order to make the comparison consistent.

Exhibit 37 makes these various adjustments and Scotia's secretary explained these various matters as well as the entire exhibit (242a-244a). The comparison reflects a difference in profits as between the two periods of $972,922. The jury did not find damage to this extent, but concluded that because of UMW's illegally handcuffed position in bargaining Scotia was damaged in an amount equivalent to the amount of profit made by Scotia in the first period, or $770,069.03 (456a).

ARGUMENT

A. THERE CAN BE NO ISSUE AS TO WHAT THE GOVERNING LAW IS, BECAUSE THE JURY WAS INSTRUCTED ACCORDING TO THE REQUEST AND STIPULATION OF THE PETITIONER.

The jury charge given by Judge Lively was the charge requested by UMW and agreed to by Scotia and it was pretty much the same charge which had been given in the first trial of this case by Judge Moynahan when there was a hung jury. Neither party objected or excepted to any part of the charge (440a-443a). The reason there could be agreement about what the governing law was is because of the thorough development of the law in the previous cases upon this alleged conspiracy which were considered in the Court of Appeals and the Supreme Court.

B. IN THE LIGHT OF THE HISTORY OF THE PREVIOUS CASES THERE CAN BE NO SUCCESSFUL CONTEST OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE VERDICT AS TO EXISTENCE AND CONTINUANCE OF THE CONSPIRACY.

The Court may rest assured that all of the important evidence about conspiracy and combined action against competition participated in by union and big business in the coal industry has been used in this record. In addition there has been used for the first time certain newly discovered minutes of meetings, correspondence and testimony of actual participants which make the existence of the conspiracy beyond question. In other words the evidence of intentional and deliberate anticompetitive conduct violative of the Sherman Act as interpreted by the Supreme Court is stronger and more believable than in the previous cases. The jury was all the more justified in believing our contentions.

With regard to arguments of petitioner about insufficiency of the evidence the Trial Judge, Judge Lively, said in his memorandum filed upon post-trial motions in the District Court:

". . . in Tennessee Consolidated Coal Co. v. UMW, 416 F.2d 1192 (1969), cert. denied 397 U.S. 964, (1970), and South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767 (1970), cert. denied, 402 U.S. 983 (1971), the Court of Appeals for the Sixth Circuit upheld jury verdicts where the same argument was made. While it is true that there are some differences between the proof which the jury heard in the two cited cases and in Scotia, in many essential areas the evidence is similar or

identical. Furthermore, in two similar cases in which district courts sitting without juries upon remand after reversal on other issues found for the defendants, there was no indication that the defendants were entitled to involuntary dismissals under Rule 41(b), Fed. R. Civ. P., at the close of the plaintiff's cases. Rather, these cases were treated as ones where there was a conflict in the evidence and the findings of the district court were upheld as not clearly erroneous. See Lewis v. Pennington, 257 F. Supp. 815 (E.D. Tenn. 1966), aff'd, 400 F.2d 806 (6th Cir.), cert. denied, 393 U.S. 983 (1968); and Ramsey v. UMW, 344 F. Supp. 1029 (E.D. Tenn. 1972), aff'd, 481 F.2d 742 (6th Cir.), cert. denied, 414 U.S. 1067 (1973)." (33a)

The Order of the Sixth Circuit recites that that Court reviewed the record and found that the evidence supported the jury verdict.

As to any contention that the conspiracy was abandoned by the period of damages in this case, 1966-1967, our Counterstatement of Facts, Part 1 (b) 4 above, discusses at some length the proposition that it would be hard to believe that the conspirators had abandoned their conspiracy or the implicit understandings in the PWC in the period of this case in 1966 and 1967. We refer to that discussion at this point.

Judge Lively said in his Memorandum filed below:

"UMW argues that the previous cases in which the Sixth Circuit upheld jury verdicts for plaintiffs involved damage period prior to 1964 when UMW claims the PWC was delated from the national contract.

Since Scotia has claimed damages for a period beginning after 1964, it is argued that even if there was evidence of an illegal agreement, the conspiracy terminated with the removal of the PWC in 1964 and Scotia has failed to connect its alleged damages to the claimed antitrust violation. I do not believe that the fact that the PWC was removed from the national agreement in 1964 was determinative of the issues in this case.

"There was evidence other than the PWC itself from which an agreement could be inferred. Though the PWC did not appear in the contract after 1964, the conduct of the parties in 1965 and 1966 might be construed as indicating that the underlying agreement which the PWC sought to implement continued implicitly through the period of claimed damages by Scotia. Additionally, the "80-cent Wage Clause" might have been viewed by the jury as a continuation of the underlying purpose of the Protective Wage Clause. See South-East Coal Co. v. UMW, 434 F.2d at 782-83. Furthermore, there was evidence that since the formation of BCOA in 1950, the UMW has not approved any bituminous contract except under the national contract terms, and its leaders as well as the leaders of BCOA have publicly expressed a preference for concentration of the coal industry in strong hands." (34a-35a)

In response to the request of UMW and agreement of the parties (see 440a-443a), Judge Lively charged the jury:

"Once an illegal agreement, combination of conspiracy has been established, an abandonment of

the unlawful understanding may not be lightly inferred." (448a-449a)

This was in conformity with many cases under the Sherman Act. See: *Park, Davis and Company v. United States*, 362 U.S. 29, 47-48; *United States v. W. T. Grant Company*, 345 U.S. 629, 633; *Hartford Empire Company v. United States*, 323 U.S. 386 at 407; *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, at 119.

C. IN REPLY TO UMW'S FIRST QUESTION, UMW HAS IGNORED COMPLETELY THE BULK OF THE RECORD ON CONSPIRACY INCLUDING MUCH NEW EVIDENCE INTRODUCED FOR THE FIRST TIME FROM MINUTES OF MEETINGS, CORRESPONDENCE AND PUBLIC STATEMENTS WHICH PROVES BEYOND QUESTION THAT UMW HELPED FASHION THE RESTRICTIVE APPARATUS AND KEPT IT GOING THROUGH THE PERIOD OF THIS CASE FOR THE PURPOSE OF AIDING THE BIG ASSOCIATIONS TO KEEP COMPETING COAL OUT OF THE MARKETS TO HOLD PRICES UP. ARGUMENT ABOUT "COINCIDENCE OF MOTIVES" AND "EQUAL HYPOTHESIS" IS MEANINGLESS ON SUCH A RECORD.

We have set forth above our counter-statement of the facts. We had to do this at length because UMW has presented the facts in such a way as to present a question based on insufficiency of the evidence under contentions about "coincidence of motives" and "equal hypothesis".

But it is not appropriate to bend the facts to fit a contention made in a petition for certiorari. That is a waste of time and can lead to improvident granting of review.

There is no (there could be no) contention by UMW that the Court did not fairly present to the jury the law about "coincidence of motives" or "equal hypothesis" because the Court gave the jury instructions requested by UMW and agreed to by Scotia. It is simply that UMW presents the facts on appeal in a way to make its contentions plausible.

But in this record there is an abundance of evidence about why the restrictive system was put in and why it was continued through the period involved here. It was for the jury to weigh this evidence under the charge requested by UMW and given by the Court. This is what was done, and the jury found that the well documented proof about anticompetitive purposes motivating the conspirators was true.

D. IN REPLY TO UMW'S SECOND QUESTION, THE MEANING UMW GIVES TO THE VISITS OF SCOTIA'S FORMER PRESIDENT TO THE UMW'S INTERNATIONAL OFFICERS AND THE WORDS SAID ARE CONTRARY TO REASON, PARTICULARLY IN LIGHT OF THE CIRCUMSTANCES AND THE REST OF THE RECORD ABOUT PROFITS AND LOSSES AND EFFECT OF THE NATIONAL CONTRACT. THE JURY REJECTED UMW'S INTERPRETATION OF THESE VISITS BASED ON OVERWHELMING EVIDENCE CONTRARY TO UMW'S CONTENTIONS.

1. *The True Background of the Bonnyman Visits.*

The evidence about the visit of Gordon Bonnyman, former President of Blue Diamond, to George Titler, UMW's Vice President, and what was said there, comes from a deposition of Bonnyman in another case which did not pertain to the Scotia Mine. The strained nature of the UMW contention and construction of the conversation is indicated by the background of it.

Our Statement of Facts above shows the effects of the National Bituminous Coal Wage Agreement upon the whole industry. After subtracting the profits of the two largest coal companies, Consolidation and Peabody, the rest of the industry combined was losing \$12,500,000 after paying \$105,200,000 to the UMW Welfare Fund (366a-368a).

Blue Diamond itself had previously operated a number of deep lines in Virginia, East Kentucky, and Tennessee, but these had passed into the non-profitable category and gone out of existence leaving only the Leatherwood Mine, the last mine of any operator to carry on under the burdens of UMW's national contract in the whole Hazard Field of

East Kentucky, until it was losing heavily and Blue Diamond got out from under the contract. It had refused to sign the 1964 contract.

Scotia was the source of profits for the Blue Diamond operation (53a-55a). There was no way for Blue Diamond to return to the UMW-BCOA fold by acquiring the type of coal land and reserves essential to national contract operations. This kind of land was by now contained in the reserves of the major companies (281a-283a).

It was with this kind of background that UMW came and gained recognition at Scotia and tried to bring the unit back under the national contract. The record shows UMW had never approved of a change in a single contract from the terms of the BCOA contract since 1950 (112a-113a), although there were the "illegal contracts" or "Sweetheart contracts" made by some UMW agents in the field which are mentioned in the minutes of SCPA and broadly known to exist before the big associations put a stop to any special arrangements made by UMW agents (157a-160a; 286a-287a).

In the light of this background it would be natural for Blue Diamond and Scotia to view the prospects of successful bargaining with UMW at Scotia in a pessimistic light. Obviously there was really no chance of anything happening except what did happen. As UMW's petition says at page 4 after six meetings, three after the strike started, the negotiations broke down and the parties "remained poles apart". To hold damages down it was imperative that some more extraordinary effort be made and the efforts Bonnyman made along this line is what UMW now criticizes.

2. *Scotia's and Blue Diamond's Survival Depended on Changing the UMW Contract Terms Covering "Affiliated Operations" as Well as the Scotia Mine, or Weathering the Strike. The Whole Blue Diamond Operation had to be Considered in Relation to National Contract Terms by Reasons of the Express Restraints Contained in the Contract.*

The dependence of the Blue Diamond affiliated group upon the Scotia Mine to make some profit is clear from the record. The Leatherwood employees as well as the Scotia men were dependent on this profit because of Leatherwood's losses, and the stockholders, consisting mostly of employees and retired employees and their families, were dependent on the Scotia profits for some return on their \$19,000,000 or \$20,000,000 equity investment (53a-55a, 64a).

The overreaching effort of the BCOA-UMW unit to close out non-union and non-contract coal from the markets had resulted in the express restraints in the face of the national contract which made it necessary to consider and evaluate the impact of a national contract signature upon the various parts of an affiliated group of companies —not just upon a single mine.

Blue Diamond and Scotia were closely affiliated. Scotia was wholly owned by Blue Diamond and they had the same officers and directors (43a). They shared the same offices and personnel for general mine administration and sales of coal (243a, 459a).

The PWC had provided in the 1959 contract that a signatory would conduct its operations so as to comply with the contract whether operations were by the signatory or by an affiliated company, and that the contract covered

the operation of all lands and facilities of the signatory and any affiliated company (125a). This provision was carried over into the 1964 contract (Exh. 28, Pages 2 and 3).

Also in the 1964 contract was added the "Eighty Cent Welfare Clause" which imposed the eighty cents per ton penalty for marketing non-contract coal not only upon the signatory but also any affiliated company (186a-187a).

It is not reasonable to expect the Blue Diamond's officers to sign such a UMW contract acting as Scotia's officers without trying to get some change or express understanding that would eliminate the broad coverage of these words. As Bonnyman testified, "Anybody who had any financial responsibility would not undertake to sign a contract and then not live up to it." (286a-287a).

Bonnyman was familiar with the broading out of the application of the boycott and restraint policy against non-contract companies through the use of pressure on parent companies after their subsidiaries were signed under the national contract. This had been recently brought foreceably to his attention with respect to the steel companies, and their captive company signatories, both with respect to purchase of non-contract coal by a parent company and allowing coal land of a parent company to be used by a non-contract operation Blue Diamond had been boycotted under these terms (302a-303a).

The main part of the Bonnyman meeting with Titler at Pittsburgh appears to have been concerned with the contract restraints as applied in the situation of enforcement through parent companies after captive company signatures (299a). The importance of this to Blue Diamond is obvious. The 30¢ to 40¢ extra demanded by UMW from Scotia for welfare meant $315,000 to $420,000

extra expense for Scotia's 1,050,000 tons and the 80¢ penalty meant over $2,000,000 for affiliated non-contract coal tonnage on 2,570,000 tons (459a), all this being extra expense because of Scotia's signing a national contract—a total of over $2,315,000.

The Bonnyman deposition had to do with an entirely different case and a different time but it does disclose that Bonnyman and Titler at the Pittsburgh meeting were discussing the contract and its restraints. He says their discussion about this "was inconclusive and our next move was that he suggested that we go see Mr. Boyle" (299a). They did see Boyle but all Bonnyman got was a 15 minute lecture demanding a contract (297a). It is obvious not one word of the national contract could be changed. It never had been in a single instance since 1950.

3. *By Expressing a Willingness to Consider Signing a Contract at Scotia Subject to Certain Adjustments, Bonnyman Was Only Expressing the Kind of Attitude Required by the Labor Law; That is, a Willingness to Bargain.*

It was at the same Pittsburgh meeting with Titler that Bonnyman said the company would entertain the idea of signing at Scotia if Leatherwood would be left alone, subject however to working out certain conditions (299a).

The Bonnyman deposition gives no insight as to what the conditions to be worked out were. However, the Stallard testimony about the Scotia negotiations clearly discloses that the real stumbling block was the welfare fund provisions of the contract. Paying $300 per month per man for benefits which could be purchased from insurance companies for $60 per month, with the extra

money going off to other places for others to use was not acceptable to Scotia, which wanted to set up a welfare fund for the Scotia unit (231a-232a, Exh. 36, 235a, 255a). Of course, this would also have eliminated the "Eighty Cent Welfare Clause" and its effect on affiliates.

Bonnyman's offer to consider a contract at Scotia subject to adjustment must be viewed in the light of what the labor law requires. There would be a violation of the labor law duty to bargain if he expressed any attitude other than a willingness to bargain at Scotia.

We submit, that Judge Lively has given UMW's contention about Bonnyman's visits causing the damages actually more than the credit it is due when he wrote in his Memorandum on post-trial motions:

> "Though the jury could have viewed the Bonnyman testimony as establishing a totally unrelated cause of Scotia's damages, I do not believe that this testimony, consisting of several pages of questions and answers in a deposition taken in a previous case, completely eliminated every reasonable inference that Scotia suffered damages as the result of an illegal agreement between UMW and BCOA. Though UMW emphasizes 'the Leatherwood issue' in its brief, the testimony of Bonnyman was not presented at the trial as the one fundamental difference between this case and the *Tennessee Consolidated* and *South-East Coal* cases. Actually, in its brief UMW uses such expressions as 'fairly to be inferred' and 'in so many words.' While the Bonnyman testimony could be viewed as supporting the interpretation placed upon it by UMW, it does not compel such a conclusion." (36a-37a).

We submit all Bonnyman was trying to do was go the extra mile in carrying out a statutory duty to bargain in good faith, and attain some contract his companies could live with, and avoid the disaster of a strike. The jury so found.

4. ***Antitrust Law Does Not Require That a Sherman Act Violation, to Impose Liability, Be "Ruinous" to the Plaintiff. It Rather Requires Injury or Damage to Business or Property.***

UMW's brief appears to say that the Supreme Court in *Ramsey* (401 U.S. at 314) requires a showing of absolute inability to pay UMW's national contract terms in order to recover and it makes no difference in what kind of shape or condition those terms leave the business after such payment is extracted from it.

This was not UMW's view of the law when it proposed the instructions to the jury which Judge Lively did give. Those instructions proposed by UMW (440a-443a) used the expression "where the union agrees to ____ insist on imposing or maintaining in other bargaining units specified wage standards *harmful, or ruinous* to the business of those employers it is liable ____" (447a).

This, of course, is consistent with the Clayton Act, Section 4 which imposes liability to "any person who shall be injured in his business or property" and the recovery shall be "three-fold the damages by him sustained". (15USC 15).

Under this "ruinous" contention UMW relies on what Bonnyman said to Titler as showing an admission of ability to pay. But Bonnyman made no such admission.

Judge Lively's Memorandum gives UMW's contention in this regard all that it is entitled to when he says:

"In its brief UMW also argues that the uncontroverted testimony of the president of Scotia's parent, Blue Diamond, shows that the plaintiff was fully able to meet the demands of UMW at the Scotia mine and offered to do so in exchange for an agreement by UMW not to attempt to organize the Leatherwood Mine which was also owned by Blue Diamond. UMW quotes from *Ramsey I*, 401 U.S. at 313. 'Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed-upon conduct.' UMW argues that the testimony of Mr. Bonnyman shows that the UMW demand was not ruinous to Scotia and that it brought the strike and consequent damages upon itself by asking UMW to violate its principles by agreeing to make no attempt to organize the Leatherwood Mine.

"The phrase, 'ruinous to the business' does not appear to me to establish an absolute requirement for recovery in this type case. If a conspiracy in violation of the antitrust laws is shown, the victim of the conspiracy should be able to recover its damages whether they result in absolute ruin or not. Moreover, while the testimony of Mr. Bonnyman contains reference to the fact that Scotia was a profitable operation at the time of the discussion with UMW in 1965 he also stated that it would have been disastrous for Scotia to have met the terms of the national contract." (35a-36a).

5. *On the Record, Scotia Would have Been Ruined by the National Contract Even if Considered Alone.*

The Bonnyman deposition, taken in an entirely different legal matter, is not the only evidence as to plaintiff's ability to observe national contract terms. The background of the effects of the national contract on the industry generally, the Hazard Field, and Blue Diamond is given above.

Hoffman, who succeeded Bonnyman as President of the companies, and who was Vice President and a director during the negotiations, testified:

"Perhaps at that time we could (have) done fairly well without the 40¢ per ton welfare. That was the stumbling block as for trying to make any profits." (56a).

And more specifically he testified:

"Q115. Did the board make an analysis of what the effect the signing of the national contract would be on the profit situation in Scotia? A. Well it would have brought down the profits the Scotia Mine was carrying our load at that time—of making any profits and if we'd—as I stated, we might have been all right without the 40¢ per ton welfare is what we found that we couldn't come out and make a profit." (57a).

This answer went to the jury without UMW going to the records to challenge it. Nor could there be any successful challenge to this answer on the record.

During the month of March, 1966, when the first meetings between Scotia and UMW were being held, the Scotia officials looked back on the previous fiscal year's profits of $574,811 for March 31, 1965 (245a). While in the three months before the strike productivity and profits were to reach higher levels (458a), there was reason during the negotiations for the officials of Scotia to fear added costs of around $600,000 as putting the Scotia Mine not just in a marginal position but in a net loss (see 245a and 458a). As Scotia's Secretary, Stallard, testified:

> "You don't know what would take place. Once you sign a contract you are stuck with the terms and provisions of that contract. You pay the wages, pay the Welfare. If you lose $1,000,000 you still are going to pay the wages and you pay the Welfare. The company is the one that loses." (256a).

UMW was demanding a wage increase to reach a scale of $27 to $30 per ton per day, an increase of about $6 per man per day (233a). The 1966 national contracts signed by BCOA and UMW during the Scotia meetings was actually $27.25 to $30 per day, a little over an average of $6 per day increase or about 4.1 times the $1.50 increase which Scotia gave in 1966 and which cost $73,130 (462a). If the increase were 4.1 times that, it would project an increased cost of $300,000, or more than half the profits of the previous fiscal year.

The extra 30¢ to 40¢ per ton welfare cost on Scotia's 1,000,000 ton per year mine (43a, 458a) which UMW was demanding would mean additional extra cost of $300,000 to $400,000, or a total (combined with increased wages) of between $600,000 to $700,000 increased cost, or considerably more than the previous fiscal year's profit.

And this is without consideration of the threat of the "Eighty Cent Welfare" penalty hanging over the Blue Diamond affiliated companies.

Mr. Hoffman was asked on cross-examination:

> "Well, Mr. Hoffman, isn't the whole theory of collective bargaining trying to get the union and the company together on how much profit the company is going to make and how much the union is going to get?"

Mr. Hoffman's reply is worthy of note:

> "I would think you should have a right to bargain so that you have knowledge that you are going to make money, some money, without accepting someone else's contract that you didn't have anything to do with." (65a).

When this right was stripped away, as in this case, by reason of illegal conspiracy, certainly there is liability for "injury" or "damage" within the meaning of 15 USCA Sec. 15, and within the meaning of the Supreme Court's *Ramsey* Opinion.

CONCLUSION

The petition of UMW does not reflect the record except for those parts which UMW wants to show. It seeks to draw conclusions just from those parts. It omits any reference whatsoever to the well documented facts about the conspirators' express anti-competitive plans and purposes and their actually putting into effect together the apparatus of the conspiracy, and their expressly agreeing that restrictions should continue as they fought together the Landrum-Griffen case through the period of this case.

The jury had the benefit of the whole record and rejected UMW arguments based on only a small part of the record. The District Court and Court of Appeals have found the record supports the verdict. There is no legal issue in the light of the fact that the Court followed the charge to the jury requested by UMW.

It is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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